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OFFICE OF SECRETARY

September 26, 1996

Mr. William Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments On Extension of FCC Rule Related to Satellites and Antennas under
the Section 207 of the Telecommunications Act of 1996

IB Docket No. 95-59
CS Docket No. 96-83

Dear Mr. Caton:

We are writing to provide the Federal Communications Commission ("FCC") and the Commissioners with our firm's comments relative to the FCC's request for further comments contained in its Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, CS Docket No. 96-83, adopted August 5, 1996 and released August 6, 1996 (hereinafter "Report"). In that report the FCC requested additional comments related to "whether, and if so how, to extend our rule to situations in which antennas may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter." Our comments are related specifically to the rule's application in the context of community associations and whether the FCC should extend the rule to: 1) the "common areas" of homeowners/property owners associations; 2) the property owned by a residential housing cooperative associations; or 3) the "common elements" of a condominium association. For the reasons stated below, it is our opinion and position that the FCC rules relative to satellite dishes under a meter, MMDS systems and television antennas and the rule's application should not be extended to cover the referenced properties.

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Chadwick, Washington, Olters, Moriarty & Lynn, P.C. represents over 400 condominiums, cooperatives and homeowners associations in Virginia, Maryland and the District of Columbia. We have had substantial experience dealing with the unique property rights and interests concerning community associations and the rights of their residents. We appreciate this opportunity to share our thoughts and insights with you concerning the implementation of Section 207 of the Telecommunications Act of 1996 as applied to community associations.

1) Common Areas of Homeowner/Property Owner Associations.

For the purposes of these comments, “common area” refers to property within a subdivided tract of land which is designed not for the purpose of building an individual residence or home, but is, generally, designed to provide green space, recreational facilities, or the infrastructure and facilities (i.e., roadways) which service the subdivision and the lots located therein. Generally, these common areas are owned and title is held in the name of an incorporated association. Thus, a separate entity recognized by law owns these parcels of land. Individual homeowners or property owners do not have an ownership interest in these properties but at best may have, dependent on the recorded documentation, an ability to use the common areas together with other owners within the subdivision. This right of use, if provided in the recorded documents, however, is a right of use held jointly with all other owners within the subdivision. Most of the time this right of use is restricted and, in some cases can be suspended by the Association owner.

Because of the nature of the ownership of this “common area” property, any governmental imposition of control regarding how this property could be used, in our opinion, would be a “taking” and would be subject to challenge on that basis. For that reason, it is our opinion that the rule should not be extended to apply to common areas within homeowner and property owner associations/subdivisions. Additionally, because of the ownership of this common area, an “antenna user,” as that term is used in the rule, does not have an ownership interest in the property and, therefore, common areas in the context of a homeowner/property owner association really falls outside of the scope of the inquiry raised by the FCC in Paragraph 63 of the Report, which refers only to “common property for the benefit of one with an ownership interest.” Finally, any use of this property by an antenna user would be in derogation of the owner’s interests and rights, in violation of other individual’s use of this area, and a usurpation of privately owned property without consent or compensation.

Accordingly, we urge that the FCC not extend the application of the rule to common areas of homeowner/property owner association, where there is no titled ownership interest of the antenna user in the property and where the antenna user does not have exclusive use.

2) Property Owned By A Residential Housing Cooperative.

A residential housing cooperative is generally a form of housing where an incorporated entity owns title to the property and improvements on that property (including the building itself) and the members own shares of stock or other indicia of ownership, not in the property but in the

entity which owns the property. This stock ownership, generally, entitles the holder to the use of a specified apartment or unit in the cooperative building. Once again, the "antenna user" in this case would not have any ownership interest in the property in question and, but for the apartment, would not have any exclusive use of any of the incorporated cooperative's other property such as the exterior walls or roof of the building. Accordingly, for the same reasons stated in our section on Homeowner/Property Owner Association, set forth above, we do not believe that the rule should be extended to apply to real property in a housing cooperative, which the antenna user does not have an ownership interest or title in and over which he/she does not have exclusive use.

3) Common Elements in a Condominium.

The common elements of a condominium, unlike common areas in a homeowner association or property in a residential housing cooperative, are generally owned, in common, on a percentage interest basis, with all other unit owners of the condominium. Thus, the potential antenna user may have an ownership interest in the common elements of a condominium. There are two types of common elements, however, limited common elements (over which a unit owner may have an exclusive use) and general common elements (over which the unit owner does not have an exclusive use but a use in general with all other unit owners in the condominium). The roofs, walls, lobbies, driveways and open areas of the condominium are typical general common elements. While it is apparent in the rule that the FCC intended for limited common elements to fall within the purview of the rule, the rule does not now apply to the general common elements. For the reasons set forth below, it is our position that the rule should not be extended to pertain to the general common elements within a condominium:

a) The rule as currently set forth applies to property "within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property. The rule does not currently apply to general common elements, nor should it, because the user does not have "exclusive use or control" of the portions of the property comprising the general common elements of the condominium. Because the use of this property is intended for and reserved for the use and benefit of all unit owners within a condominium, any attempt by a unit owner to use the common elements for his/her own exclusive use would be in violation of real property and condominium law in most jurisdictions in the United States;

b) The maintenance, repair, and replacement of the general common elements of a condominium are generally the exclusive responsibility and liability of the condominium association. If the rule were to extend to allow antenna users to indiscriminately install satellites or antennas anywhere on the general common elements, the association's ability to effectively maintain and repair would be seriously impacted and the cost of such would be greatly increased;

c) The potential for affecting the validity of any manufacturer's or installer's warranties on components comprising the general common elements of the condominium and paid for by the condominium association would be increased and such warranties jeopardized if antenna users were allowed to use the general common elements for installation purposes;

FCC

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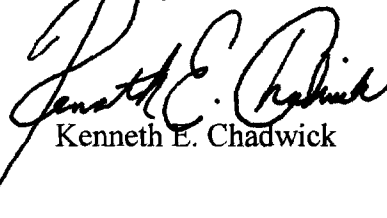
d) Finally, the potential for increasing insurance costs, denial of insurance claims, cancellation of insurance coverage or unavailability of insurance coverage are real threats if antenna users are allowed to use the general common elements, over which they do not have exclusive use, for the purposes of installing antennas and satellites. The ability to acquire and maintain property casualty insurance is premised on the assumption that the person or entity responsible for the integrity, maintenance, repair and replacement of the property, especially the building envelope and infrastructure, will maintain it in such a way as to minimize the potential for a loss. If antenna users are allowed to affect the general common elements, the condominium association ability to control, maintain and promote the integrity of the property, buildings and their components will be seriously undermined.

For all these reasons, we respectfully urge the FCC not to extend the applicability of the rule to the general common elements of a condominium association over which the antenna user does not have the exclusive use or control.

In closing, the FCC also requested comment on "The Community's"(Community Associations Institute's) suggestion, referenced in paragraph 49 of the report, involving the potential for central reception facilities. It is our position that decisions of this nature should be left to the democratic processes already present in community associations, whether they be condominium, cooperative, or homeowner/property owner associations. Self-determination by the unit owners, shareholders or homeowners within the community/subdivision would allow for the unique nature and circumstances of each association to be taken into account by the parties and persons most directly affected and impacted. Therefore, we believe that whether or not a community has or wants "central reception facilities" should be left to the individual associations and their members, all of whom have voting rights, to decide.

Thank you for this opportunity to provide our comments on the further proposed rulemaking and for taking the time to seriously consider these and the other comments you receive. Should you have any questions or seek additional information, please feel free to contact me or any member of this firm. We look forward to your decision in this matter.

Sincerely,



Kenneth E. Chadwick